(3)

IN THE HIGH COURT OF JUDICATURE AT BILASPUR

WRIT PETITION NO. 628 OF 2003

PETITIONER :

Ghanshyam Prasad Tenduve, S/o. Shri Rameshwar Prasad Tenduve, aged about 30 years, Occupation Sarpanch of Gram Panchayat - Tilaipali, Vikas Khand - Bilaigarh, Distt. – Raipur (C.G.)

P. R. No. A/73/03
Presented by Shri Aman Kesharwani
dated 11.02.03

VERSUS

RESPONDENTS :

(1) State of Chhattisgarh
Through: Secretary Department of Panchayat Mantralaya, Shashtri Chowk, Distt. – Raipur (C.G.)

(2) Collector
Raipur, Distt.- Raipur (C.G.)

WRIT PETITION U/A 226/227 OF THE CONSITITUTION OF INDIA FOR ISSUANCE OF A WRIT IN THE NATURE OF MUNDAMUS, PROHIBITION CERTIORARY ETC.OR ANY OTHER DIRECTION OR ORDER TO DO JUSTICE IN THE MATTER.

(28)

A.F.R.

HIGH COURT OF JUDICATURE AT BILASPUR: CHHATTISGARH

WRIT PETITION NO.463 OF 2002

Yashwant Kumar Sahu

Versus

State of Chhattisgarh and another

ALONG WITH

W.P.Nos.:- 463/2002, 523/2002, 685/2002, 873/2002, 1327/2002, 1397/2002, 1522/2002, 1630/2002, 1665/2002, 1710/2002, 1745/2002, 1788/2002, 1846/2002, 1870/2002, 1875/2002, 1897/2002, 1912/2002, 2014/2002, 2032/2002, 2042/2002, 2048/2002, 2086/2002, 2091/2002, 2115/2002, 2139/2002, 2154/2002, 2155/2002, 2171/2002, 2231/2002, 2234/2002, 2244/2002, 2289/2002, 2364/2002, 2402/2002, 2468/2002, 2471/2002, 2472/2002, 2641/2002, 2727/2002, 2761/2002, 2762/2002, 2782/2002, 57/2003, 145/2003, 157/2003, 187/2003, 193/2003, 296/2003, 317/2003, 318/2003, 321/2003, 355/2003, 377/2003, 399/2003, 466/2003, 467/2003, 512/2003, 517/2003, 553/2003, 554/2003, 581/2003, 617/2003, 623/2003, 628/2003, 644/2003, 645/2003, 663/2003, 711/2003, 745/2003, 770/2003, 771/2003, 1045/2003, 1083/2003, 1169/2003, 1181/2003, 1237/2003, 1394/2003, 1398/2003, 1401/2003, 1405/2003, 1407/2003, 1675/2003, 1735/2003, 1895/2003, 1958/2003, 2015/2003, 2133/2003, 2231/2003, 2303/2003, 2750/2003, 1156/2002, 1362/2002, 1400/2002, 1486/2002, 1789/2002, 1888/2002, 2027/2002, 2232/2002, 2374/2002, 2830/2002, 30/2003, 155/2003, 196/2003, 302/2003, 319/2003, 379/2003, 446/2003, 523/2003, 677/2003, 862/2003, 870/2003, 1097/2003, 1194/2003, 1672/2003, 1909/2003, 1965/2003, 2776/2002, 2315/2002.

ORDER FOR CONSIDERATION

Sd/-
J L.C. Bhadoo
Judge

HON'BLE THE CHIEF JUSTICE

I agree.

Sd/-
Chief Justice

Pronouncement of order.

POST FOR ~~ORDER ON~~ 10th SEPTEMBER, 2003

Sd/-
L.C. Bhadoo
Judge

(29)

HIGH COURT OF JUDICATURE AT BILASPUR: CHHATTISGARH

WRIT PETITION NO.463 OF 2002

PETITIONER:

Yashwant Kumar Sahu,
S/o Dhaneshwar Lal Sahu,
Aged about 30 years,
Sarpanch of village Panchayat Palod,
R/o village Palod,
P.O. Tekari (Julum), Abhanpur,
Raipur (C.G.)

Versus

RESPONDENTS:

1. State of Chhattisgarh,
Through Secretary,
Deptt. of Panchayat,
Mantralaya, Shastri Chowk,
Raipur (C.G.)

2. Sub Divisional Officer
(Revenue) and Prescribed
Authority, Raipur (C.G.)

ALONG WITH

W.P.Nos.:- 463/2002, 523/2002, 685/2002, 873/2002, 1327/2002, 1397/2002, 1522/2002, 1630/2002, 1665/2002, 1710/2002, 1745/2002, 1788/2002, 1846/2002, 1870/2002, 1875/2002, 1897/2002, 1912/2002, 2014/2002, 2032/2002, 2042/2002, 2048/2002, 2086/2002, 2091/2002, 2115/2002, 2139/2002, 2154/2002, 2155/2002, 2171/2002, 2231/2002, 2234/2002, 2244/2002, 2289/2002, 2364/2002, 2402/2002, 2468/2002, 2471/2002, 2472/2002, 2641/2002, 2727/2002, 2761/2002, 2762/2002, 2782/2002, 57/2003, 145/2003, 157/2003, 187/2003, 193/2003, 296/2003, 317/2003, 318/2003, 321/2003, 355/2003, 377/2003, 399/2003, 466/2003, 467/2003, 512/2003, 517/2003, 553/2003, 554/2003, 581/2003, 617/2003, 623/2003, 628/2003, 644/2003, 645/2003,

663/2003, 711/2003, 745/2003, 770/2003, 771/2003, 1045/2003, 1083/2003, 1169/2003, 1181/2003, 1237/2003, 1394/2003, 1398/2003, 1401/2003, 1405/2003, 1407/2003, 1675/2003, 1735/2003, 1895/2003, 1958/2003, 2015/2003, 2133/2003, 2231/2003, 2303/2003, 2750/2003, 1156/2002, 1362/2002, 1400/2002, 1486/2002, 1789/2002, 1888/2002, 2027/2002, 2232/2002, 2374/2002, 2830/2002, 30/2003, 155/2003, 196/2003, 302/2003, 319/2003, 379/2003, 446/2003, 523/2003, 677/2003, 862/2003, 870/2003, 1097/2003, 1194/2003, 1672/2003, 1909/2003, 1965/2003, 2776/2002, 2315/2002.

PETITIONERS BY: Shri Prashant Jayaswal, A.K. Prasad, Sanjay S. Agrawal, Arun Kochar, Anun Shukla, Sudhir Verma, Awadh Tripathi, Shailesh Ahuja, P.P. Sahu, Rajeev Shrivastava, Anand Kumar Tiwari, R.S. Patel, A.N. Bhakta, Smt. Renu Kochar, C.R. Sahu, H. S. Patel, Manoj Paranjape, Pankaj Jayaswal, B.L. Dembra, Anup Majumdar, Y.C. Sharma, Vipin Punjabi, R.S. Shrivastava, Sunil Sahu, Alok Bakshi, Prashant Mishra, Ravindra Agrawal, Malay Kumar Bhaduri, G.K. Beriwal, Parag Kotecha, Gautam Khetrapal, Prafulla Bharat, R.P. Gandharva, P. Diwakar, Ajay Ayachi, Kishore Bhaduri, B.D. Guru, Ku. Bhagirathi Sen, Shailendra Dubey; Advocates.

RESPONDENTS BY: Shri Sunil Sinha, Additional Advocate General; Shri Sanjay K. Agrawal, Deputy Advocate General and Ranbir Singh Marhas Govt. Advocate, Dr. N.K. Shukla, Senior Advocate with Shri Shailendra Shukla, Shri Umakant Singh Chandel, Alok Bakshi,

INTERVENERS BY: Shri P.K.C. Tiwari, P.P. Sahu, Pankaj Agrawal, R.S. Patel, Malay Kumar Bhaduri, V.G. Tamaskar, H.B. Agrawal; Advocates

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Division Bench*: - Hon'ble Shri K.H.N. Kuranga, C.J.

and Hon'ble Shri L.C. Bhadoo, J.

ORDER

(Passed on 12th. September, 2003)

The following order of the Court was passed by *Justice L.C.Bhadoo*: -

In this batch of writ petitions the petitioners have challenged the constitutional validity of the provision of clause (m) of sub section 1 of Section 36 of Chhattisgarh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (for short the Adhiniyam). The relevant provisions are extracted hereunder:

> "Section 36: Disqualification for being office bearer of Panchayat:-
>
> 36(1) No person shall be eligible to be an office bearer of Panchayat who xxx xxx xxx xxx :
>
> (m) : has more than two living children one of whom is born on or after the 26th day of January 2001.
>
> (2) : If any person having been elected (xxx xxx) as an office bearer of Panchayat:-
>
> (a) subsequently becomes subject to any of the disqualification mentioned in sub section (1) and such disqualification is not removable or being removable is not removed (or becomes office bearer concealing his disqualification for it which has not been questioned and decided by any election petition under section 122).
>
> xxx xxx xxx xxx xxx
>
> He shall, subject to the provisions of sub section (3), cease to be such office bearer and his office shall become vacant.

(3) : In every case the authority competent to decide whether a vacancy has occurred under sub section (2) shall be Collector in respect of Gram Panchayat and Janpad Panchayat and Commissioner in respect of Jila Parishad who may give his decision either on an application made to him by any person or on his own motion. Until, the Collector or the Commissioner, as the case may be, decides that the vacancy has occurred, the person shall not cease to be an office bearer:-

Provided that no order shall be passed under this sub section against any office bearer without giving him a reasonable opportunity of being heard.

(4) : any person aggrieved by the decision of the Collector or Commissioner, as the case may be, under sub section (3), may, within a period of 30 days from the date of such decision appeal to Commissioner or Board of Revenue respectively whose orders in such appeal shall be final."

2. The Act No. 14 of 2000 was enacted with various objects based on the past experience and in view of the shortcomings noticed in the implementation of proceeding laws and also to bring the legislation in conformity with Part IX of the Constitution of India relating to 'the Panchayats' added by the seventy third amendment and the objective behind was to disqualify persons for election of Panchayts having more than two children on or after 26th day of January 2001, the date of commencement of the Act to popularize family welfare / family planning programme. By insertion of clause (m) of sub section 1 of section 36 of the Adhiniyam a provision has been made to disqualify a person having more than two children from holding the office of the office bearer of the Panchayat even though

the Act got assent of the Governor on 9.5.2000 and published in the M .P. Gazette (extraordinary) dated 23rd May 2000. But the enforcement of the disqualification was postponed up to 26th January 2001. A person having more than two children before 26th January 2001 was not disqualified. This postponement up to 26thJanuary 2001 was with a view to take care of any conception on or around the commencement of the Act. If a woman has conceived before the commencement of the Act then any one of such couples would not be disqualified. Though not disqualified on the date of election if any person holding any of the said offices incurs a disqualification by giving birth to a child on or after 26th January 2001 becomes subject to disqualification and is disabled from continuing to hold the office. The disability is incurred by the birth of the child which resulted in increasing the number of living children including the additional child born on or after 26th January 2001.

3. We have heard learned counsel for the parties.

4. Learned counsel for the parties very fairly and frankly admitted that the points raised in these writ petitions are squarely covered by the decision of the Apex Court reported in 2003 AIR SCW 3892 Javed and Others Vs. State of Haryana and Others, in which vires of similar provision of section 175 (1) (q) of Haryana Panchayati Raj Act 1994 was challenged. In the said case the Apex Court has held the provision of section 175 (1) (q) to be intra vires. Provision of section 175 (1) (q) is reproduced as hereunder:

"No person shall be a Sarpanch or Panch of Gram Panchayat or a member of Panchayat Samiti or Zila Parishad or continue as such who -

xxx xxxx xxxx xxxx

(q) : has more than two living children.

provided that a person having more than two children on or upto the expiry of one year of the commencement of this Act, shall not be deemed to be disqualified."

Therefore, if we compare the provision of Section 175 (1) (q) of the Haryana Panchayati Raj Act,1994 and Clause (m) of Sub Section 1 of Section 36 of Chhattisgarh Panchayat Raj (Sansodhan) Adhiniyam 2000, the provision of section 175(1) (q) is similar to the provision of clause (m) of Sub section 1 of Section 36.

5. In the present case, office bearer of the Panchayat who has more than two living children one of whom is born on or after 26th January 2001 has been declared disqualified and by adding third child the office bearer incurs disqualification. Similarly, Section 175 (1) (q) of Haryana Panchayati Raj Act 1994 also made a provision regarding disqualification for having more than two living children from holding the offices specified in the Panchayat.

6. As far as the question raised in these writ petitions that this provision suffers from vice of arbitrariness is concerned, there is no substance in the argument because the classification made has nexus with the

object of popularizing family planning. The classification is well defined and well perceptible. Persons having more than two living children are clearly distinguishable from persons having not more than two living children. The two constitute two different classes and the classification is founded on an intelligible differentia clearly distinguishing one from the other. One of the objects sought to be achieved by the legislation is popularizing the family welfare/family planning programme. The disqualification enacted by the provision seeks to achieve the objective by creating a disincentive. Therefore, the classification does not suffer from any arbitrariness.

7. One of the objects of the enactment is to popularize Family Welfare/ Family Planning Programme. This is consistent with the National Population Policy. Clause (b) of Article 243 G provides that Gram Panchayats may be entrusted the powers to implement the schemes for economic development and social justice including Family Welfare and Women and Child Development. Section 21 enumerates the functions and duties of Gram Panchayat. One of the duties is implementation of family welfare programme. The family welfare would include family planning as well. Therefore, the legislature has made a provision for making a person having more than two living children ineligible to hold the post of office bearer of Panchayat. Such a provision would serve the purpose of the Act as mandated by the Constitution. The disqualification contained in the above Section seeks to achieve socio-economic welfare and health care of the masses and is consistent with the national population policy. Therefore, it is not violative of the Article 14 of the Constitution nor it is discriminatory because similar

provision is not found to have been enacted for disqualifying aspirants or holders of elective or public offices in other institutions of local self-Governance and also not in the State Legislatures and Parliament. As has been held by the Hon'ble Apex Court in the above referred judgment, under the Constitutional scheme there is a well defined legislative powers contained in Part-XI of the Constitution. The Parliament and every State Legislature has power to make laws with respect to any of the matters which fall within its field of legislation under Article 246 read with Seventh Schedule of the Constitution. A legislation by one of the States cannot be held to be discriminatory or suffering from the vice of hostile discrimination as against its citizens simply because the Parliament or the Legislatures of other States have not chosen to enact similar laws. Such schemes are implemented in a phased manner and it is not necessary that such policy must be implemented in one-go as the implementation in a phased manner is welcome for its receives gradual willing, acceptance and invites lesser resistance.

8. As has been further held by the Hon'ble Apex Court that right to contest an election is neither a fundamental right nor a common law right. It is a right conferred by a statute. There is nothing wrong in the same statute which confers the right to contest an election also to provide for the necessary qualifications without which a person cannot offer his candidature for an elective office and also to provide for disqualifications which would disable a person from contesting for, or holding, an elective statutory office. The Fundamental Rights are not to be read in isolation. They have to be read along with the Chapter on Directive Principles of State Policy and the

Fundamental Duties enshrined in Article 51-A. Under Article 38 the State shall strive to promote the welfare of the people and developing a social order empowered at distributive justice- social, economic and political. Article 47 provides that State shall promote with special care the educational and economic interests of the weaker sections of the people and in particular the constitutionally downtrodden. The concept of sustainable development which emerges as a fundamental duty from the several clauses of Article 51-A too dictates the expansion of population being kept within reasonable bounds. It is, therefore, futile to urge that the impugned legislation disqualifying persons with more than two children violates right to life and liberty guaranteed under Article 21 in any of the meanings howsoever expanded the meanings may be.

9. Moreover, all the points raised in these writ petitions have been dealt with by the Hon'ble Apex Court in the above matters, therefore, there is no need to deal with all these points again as the learned counsel for the parties have also agreed to it. Only one point was raised by Shri Awadh Tripathi and Shri Prashant Mishra advocates that when the office bearers of the Panchayat were elected at that time this provision of disqualification was not in existence, therefore, after their valid election, by amending the Panchayat Act, such provision can not be inserted which disqualify them from holding the office of office bearer of Panchayat being violative of the Constitution. But we are not convinced with the argument advanced by the advocates for the reason that the legislature has already taken care of the grievance raised by the learned advocates. This provision has not been made

effective retrospectively or from the date when it was enacted/inserted or on receiving the assent of the Governor i.e. 9.5.2000 and enforcement of this provision was postponed till 26th January 2001. In order to take care of a woman if she conceived before 9-5-2000 i.e. when the Act came into existence, then anyone of such couple would not be disqualified. Though not disqualified on the date of election if any person holding any of the said offices incurs a disqualification by giving birth to a child on or after 26th January 2001, the commencement of the Act, he becomes subject to disqualification and disabled from continuing to hold the office.

10. Therefore, challenge to constitutional validity of section 36 (1) (m) of the Adhiniyam fails and provision of section 36(1) (m) and (3) are held intra vires of the Constitution. Some of these writ petitions are directly filed under Article 226 of the Constitution of India against the show cause notice issued to the petitioners under sub section 3 of section 36 and challenged the vires of the above rules and some of the writ petitions have been filed after the decision rendered by the Collector under sub section 3 of section 36.

11. After this decision the Collector shall now proceed from the stage where their proceedings were stopped due to the stay granted by this Court and the petitioners will be entitled to appear before the authorities, represent their cases and file reply to the show cause notices issued to them. The matters in which the petitioners have directly come to this Court under Articles 226 of the Constitution of India challenging the decision of the

Collector without filing appeal under Section 36 (4) will be at liberty to file an appeal under sub section 4 of section 36 before the appropriate authority on the factual grounds only and not on the validity of this provision. They will be entitled to benefit of the limitation for the time spent by them in litigating before this Court in these writ proceedings. The writ petitions are accordingly dismissed as the provisions of section 36 (1) (a) and (3) of the Adhiniyam are held to be intra vires.

Sd/-
Chief Justice

Sd/-
L.C. Bhadoo
Judge

Subbu*